



## **DEPARTMENT OF LABOR**

### **Office of the Secretary**

### **20 CFR Part 802**

### **RIN 1290-AA35**

### **Rules of Practice and Procedure Before the Benefits Review Board**

**AGENCY:** Office of the Secretary, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** This action finalizes the Department of Labor’s (DOL or Department) proposal, published on January 11, 2021, to require electronic filing (e-filing) in proceedings before the Benefits Review Board (BRB). On January 11, 2021, the Department published a direct final rule (DFR) and companion proposed rule to require e-filing and make acceptance of electronic service (e-service) automatic by attorneys and lay representatives representing parties in proceedings before the BRB, and to provide an option for self-represented parties to utilize these electronic capabilities. The rule provided an exception to the requirements for good cause shown. The Department invited written comments from the public for 30 days on the proposed rule. The Department received significant adverse public comments from stakeholders on the similar direct final rule for the Office of Administrative Law Judges (OALJ). As many of these stakeholders also practice before the BRB, the BRB withdrew the direct final rule on February 25, 2021. The Department has reviewed the comments received in response to the proposal and is now implementing the rule as described in the proposed rule of January 11, 2021, with appropriate exceptions for good cause shown and self-represented parties.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Shepherd, Clerk of the Appellate Boards, at 202–693–6319.

**SUPPLEMENTARY INFORMATION:** This preamble is divided into three sections: Section I provides an overview of this rulemaking and describes its procedural background; Section II provides a summary of the public comments received; and Section III covers the administrative requirements for this rulemaking.

## **I. Background**

### *A. Overview*

This action is a final rule to finalize the corresponding notice of proposed rulemaking (NPRM) published in the January 11, 2021, issue of the Federal Register. The e-filing amendments are revising Part 802 in order to require e-filing and allow for automatic e-service.

A general overview of the legal framework, statements explaining the necessity of this e-filing and e-service rule, and further background on the rulemaking is available in the Department's NPRM, as published in the Federal Register on January 11, 2021, and will not be restated in full herein.

In brief, this final rule requires persons represented by attorney and non-attorney representatives to use the Department's system to file all papers electronically and to receive electronic service of documents unless another form of filing or service is allowed by the BRB for good cause; gives self-represented persons the option to use conventional means of filing, or to use the Department's system to file all papers electronically and to receive electronic service of documents; and provides that a filing made through a person's eFile/eServe system account and authorized by that person, together with that person's name on a signature block, constitutes that person's signature.

### *B. Procedural History*

On January 11, 2021, the Department initially published the e-filing amendments as a DFR without a prior proposal because the Department viewed such amendments as noncontroversial at that time and anticipated no adverse comment. The Department also published a companion NPRM in the "Proposed Rules" section of the January 11, 2021, issue to

expedite notice-and-comment rulemaking in case significant adverse comments were received from stakeholders. A significant adverse comment for the purposes of these notices is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach; or (2) why the direct final rule will be ineffective or unacceptable without a change. The proposed and direct final rules were substantively identical, and their respective comment periods ran concurrently. The Department is treating comments received on the companion direct final rule as comments regarding the proposed rule, and vice versa.

On January 11, 2021, OALJ also published e-filing amendments as a DFR, as well as a companion NPRM. Like the BRB rule, the OALJ rule would require e-filing for represented persons unless good cause is shown that justifies an alternative form of filing, and self-represented persons would have the option to e-file or file papers conventionally. The OALJ rule would deem any person required to e-file, or who opts to e-file, as having consented to e-service through the eFile/eServe system.

On February 25, 2021, the Department withdrew the January 11, 2021, DFR due to the receipt of significant adverse comment on a similar rulemaking by the OALJ. Accordingly, on March 17, 2021, the Department re-opened the comment period on the January 11, 2021, NPRM for 15 days in order to give the public an additional opportunity to voice concerns regarding the proposed e-filing rule. The Department also scheduled listening sessions in order to better understand and address concerns from practitioners and the regulated community.

## **II. Public Comments Received**

The Department invited written comment in its January 11, 2021, DFR and concurrently published NPRM. The proposed and direct final rules were substantively identical, and their comment periods ran concurrently from January 11, 2021, to February 10, 2021. On March 17, 2021, the NPRM comment period was reopened for fifteen days. Comments were submitted electronically at <https://www.regulations.gov/> using docket number DOL-2020-0013. The

Department requested comments on all issues related to the rule, including economic or other regulatory impacts of the rule on the regulated community.

In issuing this final action, the Department considered comments received on the DFR and NPRM during both the initial and subsequent comment periods. The Department also considered comments received on the similar OALJ rulemaking because commenters noted that they also practiced before the BRB. Comments to the OALJ rulemaking were submitted electronically at <https://www.regulations.gov/> using docket number DOL-2020-0015.

The Department received thirty-seven unique comments collectively on its BRB and OALJ e-filing rules. Of the thirty-seven comments received, twelve were determined to be out of scope because they were comments exclusively on the technical aspects of the Electronic Filing System and did not address the substance of the e-filing rule, addressed issues wholly unrelated to this rulemaking, or were general statements. Of the remaining twenty-five comments, one commenter—who commented on the BRB’s NPRM—supported the e-filing rule and twenty-four raised concerns that are discussed below.

#### *A. Comment Supporting the E-Filing Rule*

The BRB received one comment in support of the rule’s e-filing requirement and automation of e-service, and the rule’s extension of the e-filing and e-service options to self-represented parties. The commenter attested to the “overall greater convenience for both parties to use e-filing and e-service, as well as the costs saved by going paperless.” They observed that “it is in the public interest for the DOL to create a streamlined procedure” because “[a] disarray of inconsistent filing methods is not only burdensome to those processing at DOL, but also to those who would like to track their submitted applications.” Additionally, the commenter cited to both *Forbes* and the New York City Bar Environmental Law Committee in addressing the range of significant environmental benefits that e-filing provides.

This comment reflects the Department’s belief that e-filing will benefit all participants in BRB matters. The greater utilization of e-filing and e-service will reduce case processing times

by eliminating the timeframes required to allow for the delivery of traditional mailings. These time savings will allow the BRB to more efficiently process appeals without any sacrifice to the quality of work. It also will greatly reduce mailing and copying costs for both the BRB and the parties. The Department agrees that the cost, convenience, and efficiency benefits merit this final rule.

*B. Comments Raising Concerns about the E-Filing Rule*

Nearly all commenters raising concerns about the rule identified themselves as practitioners before the BRB or OALJ. These commenters predominately objected to the rule's e-filing mandate, but many expressed support for the Department's efforts to move to e-filing and e-service. Three opposing commenters addressed concerns with other rule provisions.

1. Comments Regarding the Portion of the Rule that Makes E-Filing Mandatory

Twenty-three commenters to the OALJ's NPRM recommended that the rule's e-filing mandate be delayed or abandoned. Several commenters expressed general support for the efficiency and modernization that e-filing provides. However, commenters expressed frustration with the BRB and OALJ e-filing systems, which they found to be time-consuming, resource intensive, and difficult to navigate. Accordingly, commenters asked that the e-filing mandate be abandoned or delayed to allow for the eFile/eServe system's redesign.

Three of these commenters encouraged the continued use of paper filings to accommodate unreliable technology. One practitioner identified the particular technological barriers faced by black lung practitioners, who "likely have some of the worst internet service in the United States" and "[o]ften experience the loss of internet access." Another noted, "[i]f internet service is disrupted, we currently have backup: 'snail mail', wherein dropping a document in the mail constitutes proper service." Practitioners also expressed concern that self-represented applicants may be disadvantaged if they cannot use the e-filing system successfully.

The Department has acknowledged the commenters' concerns with the e-filing system and has sought to improve the system's user experience. All twenty-three comments requesting

that the rule be delayed due to concerns about the eFile/eServe system were made on the OALJ's NPRM during the initial comment period that closed on February 10, 2021. After receiving these comments, the Department held listening sessions for users to provide feedback on the e-filing system. The Department relied on the information obtained at these listening sessions to improve the eFile/eServe system. The Department is confident it has sufficiently addressed the issues identified and that the e-filing mandate should therefore be implemented without additional delay.

Additionally, the final rule sufficiently responds to the commenters' technology concerns. First, Section 802.222(d)(2) allows attorneys and lay representatives to request an exemption from the e-filing mandate for good cause. Individuals who anticipate technological barriers to e-filing may use this provision to request an exemption. Second, Section 802.222(d)(3) allows self-represented parties to file in either electronic or nonelectronic format. Third, Section 802.222(d)(5) provides remedies for parties who experience technical failures in the e-filing, e-service process. Overall, the BRB framework is largely consistent with Federal district court and U.S. Courts of Appeals practice, which generally mandates e-filings for attorneys unless an exemption is granted and provides self-represented parties the option of filing pleadings in paper form.

## 2. Comments Regarding Portions of the Rule Addressing Filing Deadlines, Public Access, and Service

One commenter asked that the rule's computations of time be changed to allow e-filings to be considered timely if they are filed by 11:59 p.m. based on the time zone in which the filer is located. Section 802.221(c) requires that filing deadlines be computed using the Eastern Time zone. The Board chose the Eastern Time zone based on the fact that Washington, DC is located within it. This approach mirrors the approach of the Federal courts. *See, e.g.,* Fed. R. App. P. 26(a)(4); Fed. R. Civ. P. 6(a)(4).

The Department has considered this request and finds that maintaining the rulemaking's filing deadline computation better effectuates its goal of efficiently processing case appeals. Computing filing deadlines by the BRB's time zone allows the BRB to expeditiously determine whether a filing is timely. In contrast, a filing deadline based on the filer's location creates an administrative burden because it requires an individualized assessment of the filer's location, which may not be readily apparent in firms with multiple office locations.

One commenter asserted that requiring separate e-service was inefficient and requested that the eFile/eServe system be changed to make service on all parties automatic. Section 802.223(b)(2)(B) allows for e-service to be completed by sending a filing to a user registered with the Department's eFile/eServe system. The eFile/eServe system is designed to function similarly to the Case Management/Electronic Case Files (CM/ECF) system used by the Federal courts. This approach allows for automatic e-service, with minimal exceptions for exempt individuals and documents containing sensitive information that must be served through an alternative, secure method. Accordingly, the Department has taken measures to establish automatic service through the eFile/eServe system.

One commenter expressed concern that e-filing would impede public access to BRB and OALJ case files because the rule does not allow for general access by non-parties. The Department believes that public policy concerns merit the level of public access provided, which balances the public's right to know about proceedings and the parties' privacy interests. Here, broad public access is inappropriate because of the significant personal information contained within BRB and OALJ case files. Black lung and longshore claims also often contain extensive information of a private nature, where general public interest is limited.

Restricting general access by non-parties is consistent with the approach of the Federal courts in similar cases. Fed. R. Civ. P. 5.2(c) limits remote public access to electronic files in Social Security and immigration cases due to the significant amount of personal information these files contain. Rule 5.2(c) of the Federal Rules of Civil Procedure does not completely bar

public access because it permits non-parties to obtain the full case file at the courthouse.

Likewise, this rulemaking limits non-parties' remote access to electronic files, while allowing access through an alternative means. The Freedom of Information Act (FOIA) governs public access to agency rules, opinions, orders, records, and proceedings. *See* 5 U.S.C. 552; 29 CFR §§ 70.1 through 70.54. Under FOIA, non-parties may submit a request to obtain BRB and OALJ case files subject to the applicable FOIA exceptions. Accordingly, this final rule's restrictions on non-parties' access to electronic records in agency proceedings are consistent with FOIA's public access provisions, the Federal court process, and the policy considerations inherent in Fed. R. Civ. P. 5.2(c).

### *C. Out of Scope Comments*

Twelve comments, seven of which were made on the BRB's NPRM, were beyond the scope of this action. Five comments related only to specific concerns about using the Electronic Filing System, rather than the rule's specific e-filing mandate or other procedural amendments. To the extent that these comments refer to the e-filing mandate, these comments do not alter the Department's conclusion for the reasons noted above. One of these five comments was made on the BRB's NPRM. The commenter noted having difficulty finding an appeal in the eFile/eServe system because it failed to list cases by the claimant's first or last name, and instead listed cases by the BRB case number. In response to this comment, the Department has improved the system to allow a user to search for a case by a claimant's name, among other parameters. Another comment, also made on the BRB's NPRM, appears to pose questions to employers about their "coronavirus response plan," and is therefore out of scope. Finally, six comments—five of which were made on the BRB's NPRM—made general and vague statements that did not address specific provisions of the proposed rules, or about e-filing or e-service, and were therefore also out of scope.

### *D. Removal of Delayed Applicability Date*



This final rule will take effect 30 days after the date it is published in the Federal Register. Although this is a rule of agency procedure, the Department is using the minimum period provided under Section 553(d) of the APA for substantive rules that do not meet a statutory exception. *See* 5 U.S.C. 553(d)(3). The Department is removing the 45-day delayed applicability date included in the initial DFR and NPRM. *See Rules of Practice and Procedure for the Benefits Review Board*, 86 FR 1858, 1861, 1862 (proposed Jan. 11, 2021). The 30-day period between publication and the effective date of this final rule is reasonable and practical because the eFile/eServe system is currently operational. Accordingly, the Department no longer needs additional time to update communications about e-filing or to allow parties time to adjust to the e-filing system given the lengthy period since the public has been on notice of this proposed rule. The Department determines that both it and the public are prepared to adhere to the e-filing mandate within 30 days of this rule’s publication, obviating the need for a delayed applicability date. Thus, the rule clarifies that attorneys and lay representatives must be registered with the BRB’s eFile/eServe system—and file all pleadings, exhibits, and other documents through this system—by the effective date of the final rule.

### **III. Administrative Requirements of the Rulemaking**

*Executive Orders 12866, Regulatory Planning and Review; and 13563, Improving Regulation and Regulatory Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

This final rule has been drafted and reviewed in accordance with Executive Order 12866, as amended by Executive Order 14094. The Office of Information and Regulatory Affairs of the

Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 because the rule will not have an annual effect on the economy of \$200 million or more; will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; and will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, the rule does not raise legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles set forth in the Executive order. Accordingly, OMB has waived review.

*Regulatory Flexibility Act of 1980*

Because no notice of proposed rulemaking is required for this rule under section 553(b) of the Administrative Procedure Act, the regulatory flexibility requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, do not apply to this rule. *See* 5 U.S.C. 601(2).

*Paperwork Reduction Act*

The Department has determined that this final rule is not subject to the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, as this rulemaking involves administrative actions to which the Federal Government is a party or that occur after an administrative case file has been opened regarding a particular individual. *See* 5 CFR 1320.4 (a)(2) and (c).

*Unfunded Mandates Reform Act of 1995 and Executive Order 13132, Federalism*

The Department has reviewed this rule in accordance with the requirements of Executive Order 13132 and the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*, and has found no potential or substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. As there is no Federal mandate contained herein that could result in increased expenditures by state, local, and Tribal Governments, or by the private sector, the Department has not prepared a budgetary impact statement.

*Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*

The Department has reviewed this rule in accordance with Executive Order 13175 and has determined that it does not have “tribal implications.” The direct final rule does not “have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

### **List of Subjects in 20 CFR Part 802**

Administrative practice and procedure, Black lung benefits, Longshore and harbor workers, Workers’ compensation.

For the reasons set forth in the preamble, the Department of Labor amends 20 CFR part 802 as follows:

### **PART 802—RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for part 802 continues to read as follows:

**Authority:** 5 U.S.C. 301; 30 U.S.C. 901 et seq.; 33 U.S.C. 901 et seq.; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 03–2006, 71 FR 4219, January 25, 2006.

#### **§ 802.204 [Removed and Reserved]**

2. Remove and reserve § 802.204.

#### **§ 802.207 [Removed and Reserved]**

3. Remove and reserve § 802.207.

#### **§ 802.216 [Removed and Reserved]**

4. Remove and reserve § 802.216.

5. In § 802.219, revise paragraph (d) to read as follows:

#### **§ 802.219 Motions to the Board; orders.**

\* \* \* \* \*

(d) The rules governing the filing and service of documents in §§ 802.222 and 802.223 apply to all motions.

\* \* \* \* \*

6. Revise § 802.221 to read as follows:

**§ 802.221 Computation of time.**

(a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from which the designated period of time begins to run must not be included. The last day of the period so computed must be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) For nonelectronic documents, the time period computed under paragraph (a) of this section will be deemed complied with if—

(1) When sent by mail, the envelope containing the document is postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service, and affidavits, may be used to establish the mailing date.

(2) When sent by commercial carrier, the receipt or tracking information demonstrates that the paper was delivered to the carrier within the time period allowed.

(c) For electronic filings made through the Board's case management system, paragraph (a) of this section will be deemed to be met if the document is electronically filed within the time period allowed. A document is deemed filed as of the date and time the Board's electronic case management system records its receipt, even if transmitted outside of the Board's business hours set forth in § 801.304 of this chapter. To be considered timely, an e-filed pleading must be filed by 11:59:59 p.m. Eastern Time on the due date.

(d) A waiver of the time limitations for filing a paper, other than a notice of appeal, may be requested by proper motion filed in accordance with §§ 802.217 and 802.219.

7. Add § 802.222 to subpart B to read as follows:

**§ 802.222 Filing notice of appeal, pleadings, and other correspondence.**

This section prescribes rules and procedures by which parties and representatives to proceedings before the Board file pleadings (including notices of appeal, petitions for review and briefs,

response briefs, additional briefs, and motions), exhibits, and other documents including routine correspondence.

(a) *Requirements for all pleadings.* All pleadings filed with the Board must—

- (1) Include a caption and title.
- (2) Include a certificate of service containing—
  - (i) The date and manner of service;
  - (ii) The names of persons served; and
  - (iii) Their mail or electronic mail addresses or the addresses of the places of delivery, as appropriate for the manner of service.
- (3) Include a signature of the party (or their attorney or lay representative) and date of signature. Pleadings filed by an attorney, lay representative or self-represented party via the Board’s case management system will be deemed to be signed by that person.
- (4) Conform to standard letter dimensions (8.5 x 11 inches).

(b) *Redacted filings and exhibits.* Any person who files a pleading, exhibit, or other document that contains an individual’s social security number, taxpayer-identification number, or birth date; the name of an individual known to be a minor; or a financial-account number, must redact all such information, except the last four digits of the social security number and taxpayer-identification number; the year of the individual’s birth; the minor’s initials; and the last four digits of the financial-account number.

(c) *Nonelectronic filings.* All nonelectronic pleadings filed with the Board must be secured at the top. For each pleading filed with the Board, the original and two legible copies must be submitted. Nonelectronic filings must be sent to the U.S. Department of Labor, Benefits Review Board, ATTN: Office of the Clerk of the Appellate Boards (OCAB), 200 Constitution Ave. NW, Washington, DC 20210–0001, or otherwise presented to the Clerk.

(d) *Electronic filings.* (1) Except as provided in paragraph (d)(2) of this section, beginning on [EFFECTIVE DATE OF FINAL RULE], attorneys and lay representatives must be registered

with the Board's electronic case management system and file all pleadings, exhibits, and other documents with the Board through this system (e-file). All e-filed documents must be in Portable Document Format (PDF). The Board prefers that pleadings be filed in text-searchable PDF format. Paper copies are not required unless requested by the Board.

(2) Attorneys and lay representatives may request an exemption (pursuant to § 802.219) for good cause shown. Such a request must include a detailed explanation why e-filing or acceptance of e-service should not be required.

(3) Self-represented parties may file pleadings, exhibits, and other documents in electronic or nonelectronic form in accordance with paragraph (c) or (d) of this section.

(4) A document filed electronically is a written paper for purposes of this Part.

(5) A person who is adversely affected by a technical failure in connection with filing or receipt of an electronic document may seek appropriate relief from the Board under § 802.219. If a technical malfunction or other issue prevents access to the Board's case management system for a protracted period, the Board by special order may provide appropriate relief pending restoration of electronic access.

(e) *Special rules for notices of appeal.*

(1) Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received by the office of the Clerk of the Board.

(2) A notice of appeal submitted to any other agency or subdivision of the Department of Labor or of the U.S. Government or any state government, and subsequently received by the office of the Clerk of the Board, will be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds in its discretion that it is in the interest of justice to do so.

(3) If the notice of appeal is sent by mail or commercial carrier and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights,

it will be considered to have been filed as of the date of mailing or the date of delivery to the commercial carrier.

(i) For notices sent by mail, the date appearing on the U.S. Postal Service postmark (when available and legible) will be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service, and affidavits, may be used to establish the mailing date.

(ii) For notices sent by commercial carrier, the date of delivery to the carrier may be demonstrated by the carrier's receipt or tracking information.

(4) If the notice of appeal is electronically filed through the Board's case management system, it is considered received by the office of the Clerk of the Board as of the date and time recorded by the system under § 802.221(c).

6. Add § 802.223 to subpart B to read as follows:

**§ 802.223 Service requirements**

This section prescribes rules and procedures for serving pleadings (including notices of appeal, petitions for review, and response briefs, additional briefs, and motions), exhibits, and other documents including routine correspondence on other parties and representatives.

(a) A copy of any document filed with the Board must be served on each party and the Solicitor of Labor by the party filing the document.

(b) *Manner of service.* (1) Nonelectronic service may be completed by:

- (i) Personal delivery;
- (ii) Mail; or
- (iii) Commercial delivery.

(2) Electronic service may be completed by:

- (i) Electronic mail, if consented to in writing by the person served; or

(ii) Sending it to a user registered with the Board's electronic case management system by filing via this system. A person who registers to use the Board's case management system is deemed to have consented to accept service through the system.

(c) *When service is effected.* (1) Service by personal delivery is effected on the date the document is delivered to the recipient.

(2) Service by mail or commercial carrier is effected on mailing or delivery to the carrier.

(3) Service by electronic means is effected on sending.

(d) *Date of receipt for electronic documents.* Unless the party making service is notified that the document was not received by the party served—

(1) A document filed via the Board's case management system is considered received by registered users on the date it is sent by the system; and

(2) A document served via electronic mail is considered received by the recipient on the date it is sent.

Signed in Washington, D.C.

Julie A. Su,

Acting Secretary of Labor.